SUPREME COURT, U.S.
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No. 482

IN THE

Supreme Court of the United States

THE NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, and

INTERSTATE COMMERCE COMMISSION,

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO, INC., INTERSTATE MOTOR FREIGHT SYSTEM, and ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, and THE AMERICAN WATERWAYS OPERATORS, INC., and THE GREAT LAKES SHIP OWNERS ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE NEW YORK CENTRAL RAILROAD COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION,

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO, INC., INTERSTATE MOTOR FREIGHT SYSTEM, AND ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, AND THE AMERICAN WATERWAYS OPERATORS, INC., AND THE GREAT LAKES SHIP OWNERS ASSOCIATION,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Southern District of New York, dismissing plaintiff's request to permanently enjoin, annul and set aside an order of the Interstate Commerce Commission. The Supreme Court of the United States has jurisdiction of the appeal and a substantial question is presented.

Opinion Below

The opinion of the District Court for the Southern District of New York is reported in 194 F. Supp. 947. The opinion of the Interstate Commerce Commission is reported in 313 I.C.C. 247. Copies of the opinion of the court below and of the report of the Interstate Commerce Commission are attached hereto as Appendix A.

Jurisdiction

This suit was brought under Title 28, United States Code, Section 1336, to set aside, annul and enjoin an order of the Interstate Commerce Commission. The judgment of the District Court was entered on June 14, 1961, and notice of appeal was filed in that court on August 11, 1961. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944); *Schaffer Transportation Co.* v. *United States,* 355 U. S. 83 (1957).

Questions Presented

1. Is the Commission's application of the "destructive competitive practices" provision of the National Transportation Policy to the contract rate in question arbitrary and capricious and predicated upon a misconstruction of that provision?

2. Is the Commission's instant order arbitrary and capricious in that the Commission's report herein lacks the degree of clarity requisite to a valid administrative determination as defined in the decisions of this Court?

3. Is the Commission's condemnation of the contract rate in question arbitrary and capricious for failure to articulate the standard or construction of the "destructive competitive practices" provision of the National Transportation Policy which it applied?

4. Assuming the findings intended to support the Commission's condemnation of the contract rate in question can be ascertained, are these findings supported by substantial evidence or are they contrary to the evidence of record?

Statute Involved

National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1 of the Interstate Commerce Act as set forth in Appendix B hereto.

Statement of the Case

Appellant sought to establish, effective September 30, 1959, in its Local Contract Tariff CC-1, a contract rate on rugs and carpeting in carloads from Amsterdam, N. Y., to Chicago, Illinois. These contract rates provide for a reduction from the normally applicable tariff rate if the shipper executes a contract with appellant which provides, for a period of one year, that the shipper will agree to move at least 80 percent of its Amsterdam to Chicago traffic over the lines of the plaintiff.

The shipper is required to furnish an indemnity bond guaranteeing the payment of the difference between the contract rate and the higher non-contract rates which would become effective in the event the shipper should fail to ship the requisite percentage. The contract also provides that the shipper agrees to permit inspection of pertinent shipping data in its records and, at the end of the contract term, to furnish the appellant an affidavit setting forth the total tonnage shipped by all modes of transportation. The agreement also prohibits the appellant from

voluntarily increasing the contract rate during the term thereof and permits the shipper to cancel without the payment of any further charges if appellant fails to deliver 70 percent of the traffic at Chicago with reasonable dispatch, defined in the contract as, on or before the sixth morning after its receipt at Amsterdam. The contract rate is available to all shippers or receivers willing to execute the contract. Other provisions concern renewal of the contract and its suspension during period of strike and other emergencies.

The proposed contract rate was protested by the various water and motor carriers who were intervenor-defendants in the court below and the Commission, pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), suspended its operation until April 29, 1960, at which time it went into effect.

A one-year contract, as provided in the tariff, between the shipper, Mohasco Industries, Inc., and appellant, was executed on May 11, 1960. The required indemnity bond was simultaneously filed with appellant.

Pursuant to an agreed order entered by the Commission, all evidence was submitted in the form of verified statement and an examiner's proposed report was waived. Cross-examination was not requested by any party. Briefs were filed, and the case was argued orally before the entire Commission.

By report and order dated February 13, 1961 (313 I.C.C. 247), the Commission found the proposed contract rates "unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the National Transportation Policy." *Ibid.* at 254. The tariff was ordered cancelled on or before March 28, 1961. This date was extended by Commission order of March 3, 1961, to April 10, 1961.

The majority opinion of the Commission expresses the views of three Commissioners, Hutchinson, Tuggle and

Goff. It finds, at page 254, that "the contract rates under investigation are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the National Transportation Policy declared in the Act." The opinion states that because of this finding contract rates are in violation of Section 1 of the Interstate Commerce Act, and that there are no ultimate findings made under any other section of the Act.

Commissioners Winchell and McPherson concurred in the result without opinion. *Ibid.* at 255.

Commissioner Murphy concurred on the grounds that, although in agreement with the conclusions of the majority, he believed the rates under investigation were also violative of Sections 2 and 3 of the Interstate Commerce Act, and the Elkins Act (32 Stat. 847, 49 U.S.C. §§ 42, 43). *Ibid.* at 254-255.

Commissioners Walrath and Webb "reluctantly" concurred in the result on the grounds that the rates in question "could well" mean the end of the present national transportation system and prevent the achievement of a truly coordinated transportation system in the future. *Ibid.* at 255.

Commissioners Freas and Herring dissented on the grounds that the proposed rates were not shown to have been unlawful. The dissenting opinion reviews what it considers to be the controlling bases for the majority findings and concludes that those findings are unsupported. *Ibid.* at 255-258.

Prior to the effective date of the Commission's order, appellant by order to show cause, signed on March 29, 1961, applied for a temporary restraining order to restrain the Commission and the Government from enforcing the Commission's orders pending hearing by the three-judge statutory court. Notice was given to all appellees herein and the application for the temporary restraining order was

argued before Palmieri, U.S.D.J., on April 4, 1961. By opinion dated April 7, 1961, Judge Palmieri denied the application on the ground that appellant had not adduced sufficient proof to warrant the requested relief. Thereupon, the tariff was cancelled on April 10, 1961, on one day's notice, in compliance with the Commission's orders.

Appellant, on March 28, 1961, filed a complaint in the District Court for the Southern District of New York, pursuant to Title 28, U.S.C. Section 1336, which sought to permanently enjoin, set aside, annul and suspend the orders of the Commission. Briefs were filed and oral hearing was held on June 2, 1961, before the three-judge statutory court comprised of Friendly, U.S.C.J., Palmieri, U.S.D.J., and Metzner, U.S.D.J. In an opinion written by Judge Friendly, the three-judge court dismissed the complaint and denied appellant's request for injunctive relief.

The Questions Are Substantial

This case brings before this court for the first time, the legality of duly published and filed freight contract rates subject to Part I of the Interstate Commerce Act. This is a matter of great importance to the transportation industry as evidenced by the participation in this litigation of associations representing principal water and motor carriers operating in this country despite the fact that the particular movement of traffic involved directly affects only a few common motor carriers. This matter has received the attention of the committees in Congress having jurisdiction over transportation and has been an important and controversial topic in transportation circles for some time. Thus, important and far-reaching questions concerning the interpretation and administration of the Interstate Commerce Act are inherent in the instant case. Appellant contends that the Commission's construction of the pertinent portion of the National Transportation Policy as applied to the rates in question is arbitrary and

capricious and that the opinion of the court below which sustains, on different grounds, the Commission's application of this standard is unsupportable.

The condemnation of the rate in issue not only represents an arbitrary and capricious application of the destructive competitive practice provisions of the National Transportation Policy, but the decision of the Commission fails to conform to judicially evolved standards requisite to a valid and lawful determination. The Commission's opinion thus presents significant issues in the general field of administrative law, particularly with respect to the requirement that administrative agency opinions clearly set forth the bases upon which they rest and that the Commission's interpretation or construction of the statutory standard of lawfulness be set forth with the clarity necessary to enable a reviewing court to clearly understand what the agency has done. In addition, some of the findings of the Commission not only are lacking in evidentiary support, but also are in fact contrary to the evidence of record. Certainly, matters of this importance to the transportation industry should not be determined on the basis of a Commission report that is uncertain and confused.

1. In condemning the proposed contract rate, the Commission has applied the "destructive competitive practices" provision of the National Transportation Policy to a rate the level of which the report does not even question. It is the contractual aspect of the rate which is the source of this purported illegality under this provision.

The pertinent legislative history indicates that rate levels and not the form of publication of rates which were already fully protected under Section 6 of the Act, were the concern of Congress when it enacted this provision. The congressional purpose was to halt the then prevalent practice of rate slashing by carriers which was threatening their solvency. There is no indication that the phrase was intended to give the Commission carte blanche to con-

demn new forms of rate making not otherwise violative of the other substantive provisions of the Interstate Commerce Act.

The Commission itself, in accordance with the Congressional mandate, has consistently applied this prohibition to rate levels only. This decision is an inexplicable departure from that consistent administrative construction and application.

The court below construes the "destructive competitive practices" phrase to give the Commission authority to prohibit pricing practices condemned under previously enacted antitrust statutes such as Section 5(a) of the Federal Trade Commission Act of 1914, 15 U.S.C. § 45(a) and Section 3 of the Clayton Act, 15 U.S.C. § 14 as well as by §14 Third of the Shipping Act of 1916, 46 U.S.C. § 812.

The Commission, in the twenty years during which it has been charged with the administration of the National Transportation Policy, has never placed such a construction on the "destructive competitive practices" prohibition, nor have the courts ever held that such a construction was proper. The Commission's report does not suggest that it conceives the prohibition to incorporate antitrust concepts in relation to regulated carrier pricing.

The court below's theory that it was the congressional purpose to apply antitrust and Federal Trade Commission pricing concepts to competition which has already been committed to administrative supervision and regulation is without support.

Whether or not the court below's construction is found to be proper, it is clear that it represents a novel interpretation of an important portion of the National Transportation Policy and, therefore, presents an important question relative to its interpretation and the administration of the Interstate Commerce Act.

2. The Commission finds the contract rates here involved are "unjust and unreasonable in that they constitute 'destructive competitive practices' within the meaning of the National Transportation Policy declared in the Act." 313 I.C.C. at 254. There is no finding of illegality under any section of the Interstate Commerce Act independent of this finding. Yet, it is clear the Commission majority discussed at great length Section 2 and Section 3 questions. As stated in the concurring opinion of Commissioners Walrath and Webb, the report contains "gratuitous dissertation implying that the proposed rates are unjustly discriminatory and unduly preferential and prejudicial within the meaning of Sections 2 and 3 of the Act." *Ibid.* at 255. The majority opinion itself concedes that it has considered and discussed Sections 2 and 3 and Elkins Act questions (*Ibid.* at 254) yet no conclusions are made with respect thereto.

Neither the three Commissioner majority report nor the court below were able to provide any meaningful relationship between the Commission's findings relating to Sections 2 and 3 and the Commission's ultimate conclusion that was limited to the unlawfulness of the contract rate in question under the "destructive competitive practices" provision of the National Transportation Policy.

The decisions of this Court require administrative agency opinions to clearly set forth the grounds upon which their determinations rest. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 511 (1935); *Beaumont, Sour Lake and Western Railway* v. *United States*, 282 U. S. 74, 86 (1930); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Securities and Exchange Commission* v. *Chenery*, 332 U. S. 194, 196-7 (1947); concurring opinion of Frankfurter, J., in *Secretary of Agriculture* v. *United States*, 350 U. S. 162, 175 (1956).

It is most interesting that the several appellees in the court below each provided a different set of findings which they alleged supported the Commission's ultimate con-

clusion under the National Transportation Policy. The court below selected yet other portions of the Commission's report than were selected by appellees and assumed, without discussion, that these were the findings intended by the Commission to support its ultimate conclusion.

The court below held that the Commission found that the tariffs would constitute a "destructive competitive practice" violating the National Transportation Policy, "primarily* in two respects,"

> "The first is that the indicated extension of the practice by the Central and the inevitable response of other rail, motor and water carriers would cause 'the destruction in large measure of what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system,' p. 252. The second is that the effect of a contract such as proposed 'is to destroy competition for the duration of the contract', since 'During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor', p. 253." 194 F. Supp. at 949.

But the court below was not able to clear up the problem of whether the Commission's finding with respect to the alleged destructive effect upon the rate structure was intended to support its ultimate conclusion relative to a destructive competitive practice in violation of the National Transportation Policy. That portion of the Commission's report is part of its discussion of purported unequal treatment as between shippers and is directed

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* The use of this word seems to cast doubt on the Court's own certitude in choosing what it conceives to be the Commission's supporting findings.

to distinguishing earlier Commission decisions wherein Section 2 unlawfulness was in issue.

In addition, the Commission, even before the promulgation of the National Transportation Policy in 1940, had condemned rates as being disruptive or destructive of a given rate structure. See, for example, *Ex-Lake Iron Ore from Chicago to Granite City,* 123 I.C.C. 503, 504 (1927); *Ex-Ohio River Coal to Ohio Points,* 185 I.C.C. 211, 219 (1932); *Gasoline from San Francisco Bay Points to Ogden, Utah,* 198 I.C.C. 683, 695 (1934); *Coal from Indiana to Illinois,* 200 I.C.C. 609, 621 (1934). Thus the finding may in fact be predicated upon purported illegality under portions of the Act other than the National Transportation Policy which were discussed but specifically disclaimed in the report of the three Commissioner majority.

Another factor militating against the validity of the selection by the court below of the supporting findings is that, situated between these two findings in the report, the Commission finds that the contract provision prohibiting an increase in rate during the contract period unless ordered by the Commission "appears to be inconsistent with the continuing obligation of common carriers to establish and maintain just and reasonable rates," 313 I.C.C. at 252. It does not seem reasonable that the Commission would separate those findings intended to support its ultimate conclusion with one that apparently does not. The Commission's report is confused and lacks the clarity requisite to a valid administrative determination.

3. As a consequence of the Commission's failure to clearly articulate the factual basis or bases which support its ultimate finding of "destructive competitive practice," the opinion fails to set forth or apply the standard of lawfulness enunciated by this provision in the National Transportation Policy. Thus, as demonstrated by the opinion of the court below, the Commission's decision does not provide any guide as to what this phrase means or what facts

must be considered in determining if and how this standard is abrogated by a contract rate. The Commission must go beyond the mere words of the statute in revealing the basis for their action so that that action may be effectively judged. *Dixie Carriers* v. *United States,* 143 Fed. Supp. 884, footnote at 850 (1956), reversed on other grounds, 355 U. S. 179 (1957); *Atchison, T&S.F. Ry. Co.* v. *United States,* 295 U. S. 193, 201-202 (1935). Since the court below could find no comfort in the Commission's report, it resorted to statutes other than the Interstate Commerce Act. The Court below implies that some sort of antitrust or Federal Trade Commission Act standard is involved. Whether or not this is so, it is clear that the Commission report has failed to set forth *any* standard. The standard applied must be clearly stated in the report of the Commission and the court below erred in supplying its rationale of the standard which the Commission might have but clearly did not use in its report.

4. Assuming the Commission's report makes clear which findings are intended to support its ultimate finding of illegality under the "destructive competitive practices" provision and these findings are the ones chosen by the court below, these findings are not supported by substantial evidence and are contrary to the evidence of record. The Commission's finding with respect to the destructive effect of the instant rates upon the rate structure is not supported by substantial evidence and is, in fact, contrary to the evidence of record. It is axiomatic that the *level* of rates in a given rate relationship or rate structure determines the lawfulness of that rate relationship or structure. There is no finding or even allegation that the level of the proposed rates is unlawful. Yet the Commission finds that their publication would have a destructive effect upon the "rate structure necessary to maintain an adequate national transportation system." The evidence of record amply demonstrates that these contract rates would actually preserve and not destroy any

rate structure since the lower contract rate published at an admittedly lawful level becomes applicable only when the carrier receives sufficient traffic to make its application economically feasible.

In *United States* v. *Chicago, M., St. P. & P. R. Co., supra,* at 507, this court held that a disruption in a rate relationship is unlawful only if the rate relationship previously existing is a fair one or if the Commission is without power to avert reprisals. In the instant case neither of these factors is present since the Commission has made no findings with respect to the existing Amsterdam-Chicago rate relationships and the Commission clearly has the power to prevent any further rate adjustments of a retaliatory nature. The court below applied a very narrow construction of the *Milwaukee* holding which seems contrary to the plain language and intent of that decision.

The findings of the Commission with respect to the destructive effect of the instant rates on competitors has no evidentiary basis in the record. There is no evidence whatsoever that a shipper would forego less expensive or superior service in order to either enter into or fulfill the contractual agreement.

There is no *per se* finding of illegality of contract rates made by the Commission. Instead, it states that:

> "[A]s in all other situations, the lawfulness of innovations of this kind must be determined based on the controlling circumstances in particular situations." (313 I.C.C. at 254.)

However, the Commission, in condemning these rates as a destructive competitive practice, specifically declines to consider the contentions made by the parties respective to their relative competitive positions (313 I.C.C. 248-249). Without a finding of *per se* illegality, it is submitted that relative competitive position is a controlling circumstance, and the failure of the Commission to make findings with

respect thereto is error. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 Fed. Supp. 796 (1952) affirmed 231 F. 2d 356 (1955); cert. den. 350 U. S. 991 (1956), rehearing denied 351 U. S. 728; *Gerber Products Co.* v. *Beech-Nut Life Savers*, 160 Fed. Supp. 916 (1958).

Since the court below suggests that the meaning of "destructive competitive practice" in the National Transportation Policy is somewhat analogous to the concept of destructive competition under the antitrust statutes, it would follow that the courts and not the Commission are the final arbiters of the application of that standard. *F.T.C.* v. *Gratz*, 253 U. S. 421, 427-8 (1920); Frankfurter, J., dissenting in *F.T.C.* v. *Motion Picture Advertising Co.*, 344 U. S. 392, 404-405 (1953). Regardless of where the responsibility for making this determination lies, it is clear that it was error for the Commission to do so without considering the relative competitive position of the carriers, which is a determining factor requisite to any finding of destructive competition.

The questions presented by this appeal are substantial and they are of public importance.

Respectfully submitted,

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466 Lexington Avenue
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Dated: October 9, 1961.

APPENDIX A

NEW YORK CENTRAL RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES of America and Interstate Commerce Commission, Defendants,

National Motor Freight Traffic Association, Inc., the Eastern Central Motor Carriers Association, Inc., Boss-Linco, Inc., Interstate Motor Freight System, and Roadway Express, Inc., Waterways Freight Bureau, and the American Waterways Operators, Inc. and the Great Lakes Ship Owners Association, Intervening Defendants.

United States District Court
S. D. New York.
June 14, 1961.

Action by the New York Central Railroad Company to enjoin orders of the Interstate Commerce Commission, 313 I.C.C. 247, directing the Central to cancel a tariff providing for reduced commodity rates to shippers agreeing to move at least 80 percent of their traffic over the Central. The three-judge District Court, Friendly, Circuit Judge, held that the Commission had authority to find that the tariff was an unfair or destructive competitive practice under National Transportation Policy, and that the Commission's report was adequate to show that this was the basis of the orders.

Injunction denied and complaint dismissed.

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Interstate Commerce Commission had authority to find that railroad's tariff providing for reduced commodity

rates to shippers agreeing to move at least 80% of their traffic over railroad was an unfair or destructive competitive practice under National Transportation Policy, and Commission's report was adequate to show that this was basis of Commission's orders directing railroad to cancel such tariff. 28 U.S.C.A. §§ 1336, 2284, 2321-2325; Interstate Commerce Act, §§ 1, 2, 3(1), 15(7), 22, 501 et seq., 49 U.S.C.A. §§ 1, 2, 3(1), 15(7), 22, 1231 et seq.; Elkins Act, § 1(1) as amended 49 U.S.C.A. § 41(1); National Transportation Policy, 49 U.S.C.A. note preceding section 1; Clayton Act, § 3, 15 U.S.C.A. § 14.

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Frederick A. Babson, Jr., Washington, D. C. (Kenneth J. McAuliffe, New York City, Clyde B. Aitchison and John R. Turney, Washington, D. C., on the brief for Motor Carriers and Motor Carrier Assn's; Harry C. Ames, Washington, D. C., and Kenneth J. McAuliffe, New York City, on the brief, for Waterways Freight Bureau; and Kenneth J. McAuliffe, New York City, and John H. Eisenhart, Jr., Washington, D. C., on the brief for the American

Appendix A.

Waterways Operators, Inc. and the Great Lakes Ship Owners Ass'n), for intervenors.

Before FRIENDLY, Circuit Judge, and PALMIERI and METZNER, District Judges.

FRIENDLY, Circuit Judge.

This is an action by the New York Central Railroad, 28 U.S.C. §§ 1336, 2284 and 2321-2325, to enjoin orders of the Interstate Commerce Commission, in I. & S. Docket No. 7250, 313 I.C.C. 247, directing the Central to cancel tariffs, which had become effective due to expiration of the seven months' period of suspension, 49 U.S.C.A. § 15(7), establishing reduced commodity rates on rugs and carpeting in carloads from Amsterdam, New York to Chicago, Illinois, Judge Palmieri declined to grant a temporary restraining order; the case is now before us on application for final relief.

The regularly established rail and motor carrier rates for this traffic are, summarily stated, 185 cents per 100 pounds for a minimum of 24,000 pounds, and, in the case of the rail rates, 148 cents on weight in excess thereof. The tariff here directed to be cancelled provided for a rate of 155 cents for a minimum of 30,000 pounds and 125 cents on weight in excess of the minimum. However, and this is the bite of the case, the reduced rate was available only if the shipper executed a contract, in a form contained in the tariff, obliging him to move at least 80% of his annual Amsterdam-to-Chicago traffic over the Central; in the event of his failure to do that, the higher regular rate would apply. The contract contained provisions requiring the shipper to furnish an indemnity bond to insure such additional payment and to permit inspection of his records, and prohibiting the Central from volun-

tarily increasing the rates during the year, as well as other clauses not here material. "There is no dispute as to the compensativeness of the proposed rates.", 313 I.C.C. at 249.

After taking evidence in the form of verified statements, the Commission directed cancellation of the tariff. How the Commission did this needs be stated in some detail, since much of the Central's case hinges upon it.

The Report starts with 7½ printed pages headed "By the Commission" but actually presenting the views of three of the ten Commissioners then in office, unnamed in the report but in fact Commissioners Hutchinson, Tuggle and Goff. This opinion begins by reciting the tariffs, the economic background and the contentions of the Central and of opposing truck and water carriers. It says, *inter alia*, that "no sound classification basis appears for different rates on the same or substantially the same tonnage, dependent only on the proposed contractual arrangement.", p. 250; that under the proposed rates "it would be entirely possible for a shipment from a contracting shipper to be transported at the lower rate in the same train between the same two points with a shipment of equal or greater volume from a non-contracting shipper, without any discernible differences in transportation circumstances", p. 251; that "there is no rational basis for affording an 80-percent user a 13-percent reduction in the normal rates on a 40,000-pound shipment, as here proposed, while denying the reduction to one who is a 70-percent or a 75-percent user", p. 251; and that "there is no assurance that an 80-percent user would ship a regular and predictable volume of freight per day, week, or month." All this seems to presage a conclusion that the rates violated § 2 or § 3(1) or the Elkins Act, 49 U.S.C.A. §§ 2, 3(1), 41(1). Instead, after an intervening passage, pp. 252-254, primarily concerned with

the National Transportation Policy, which appears in 49 U.S.C.A. note preceding § 1, quoted in the margin,[1] the Report says "In view of our conclusions under section 1 of the act, there is no need to consider further the allegations under sections 2 and 3, and under the Elkins Act," p. 254, and concludes that the tariffs would constitute a "destructive competitive practice" violating the National Transportation Policy, as read into § 1, primarily in two respects. The first is that the indicated extension of the practice by the Central and the inevitable response of other rail, motor and water carriers would cause "the destruction in large measure of what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system," p. 252. The second is that the effect of a contract such as proposed "is to destroy competition for the duration of the contract", since "During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service

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[1] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act * * *, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act * * * shall be administered and enforced with a view to carrying out the above declaration of policy."

at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor", p. 253.

Commissioner Murphy filed a concurring opinion stating he agreed "with the findings and conclusions of the majority except that I would also find that the rates under investigation are in violation of sections 2 and 3, and the Elkins Act", p. 254. Commissioner Walrath, joined by Commissioner Webb, was "reluctantly constrained to agree with the result reached by the majority" but objected to "gratuitous dissertation implying that the proposed rates are unjustly discriminatory and unduly preferential and prejudicial within the meaning of sections 2 and 3 of the act." Commissioners Winchell and McPherson concurred in the result. Commissioner Freas, joined by Commissioner Herring, dissented; they stressed the desirability of permitting "experimentation within legal limits" and thought "An attempt by means otherwise lawful to stem * * diversion or to regain traffic already lost can hardly be called unduly destructive."

The Central's principal attack is that the Commission failed to articulate the basis for its disapproval with the clarity required by such decisions as United States v. Chicago, M., St. P. & P. R. Co., 1935, 294 U.S. 499, 511, 55 S.Ct. 462, 79 L.Ed. 1023; Atchison T. & S. F. Ry. Co. v. United States, 1935, 295 U.S. 193, 201-202, 55 S.Ct. 748, 79 L.Ed. 1382; and the two Chenery decisions, Securities and Exchange Commission v. Chenery Corp., 1943, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 and 1947, 332 U.S. 194, 196-197, 67 S.Ct. 1575, 1760, 91 L.Ed. 1995. See also Mr. Justice Frankfurter, concurring, in Secretary of Agriculture v. United States, 1956, 350 U.S. 162, 175, 76 S.Ct. 244, 100 L.Ed. 173. An initial phase of this claim, that there was no conclusion on which a majority of the Commission agreed, is quite clearly unfounded. To be sure, it is somewhat hard to understand how the two Commissioners who

concurred only in the result could not have found in the three prevailing opinions some one with which to agree or, on a matter of this importance, why they did not at least elucidate why they could not. Neither is the concurring opinion of Commissioners Walrath and Webb fully understood by us; we find it somewhat hard to find a formula that rationally reconciles their belief that "Contract rates could well mean the end of a national transportation system, either as we have known it (highly workable despite its imperfections), or, as many hope to see it, a truly coordinated system featuring the use of each mode of carriage under single billing", their statement they were not certain they would reach the same adverse "result in all cases involving contract rates", and their disapproval of the instant ones. Still their ultimate conclusion is plain, and even if we were to eliminate the votes of Commissioners Winchell and McPherson altogether, six commissioners would have joined in concluding that the rates "are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act."

The reference to "unfair or destructive competive practices" came into the Interstate Commerce Act in the declaration of policy of the Motor Carrier Act of 1935, 49 Stat. 543. This language was later embodied in the preamble to the Transportation Act of 1940, 54 Stat. 899. The legislative hisory cited to us by the parties does not much illumine its content; neither, in any significant degree, do the decisions of the Commission to which we have been referred. More light is shed by earlier enactments using language not dissimilar. One that comes readily to mind is § 5(a) of the Federal Trade Commission Act of 1914, § 15 U.S.C.A. § 45(a), which declared unlawful "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Although these words themselves demand interpretation, the legislative history

makes it plain they were intended to go somewhat beyond common law concepts, see F. T. C. v. R. F. Keppel & Bro., Inc., 1934, 291 U.S. 304, 310-314, 54 S.Ct. 423, 78 L.Ed. 814, and they have come to be understood as authorizing the Federal Trade Commission to proscribe at least some sorts of overly aggressive competition that would not have been deemed unlawful without them. As was said in Hastings Manufacturing Co. v. F. T. C., 6 Cir., 1946, 153 F.2d 253, 257, concerning a manufacturer who bought products of other manufacturers from distributors and also made loans to distributors and guaranteed them increased profits as compared with those previously obtained, "* * * acts not in themselves illegal or criminal, or even immoral, may, when repeated and continued and their impact upon commerce is fully revealed, constitute an unfair method of competition within the scope of the Commission's authority to regulate and forbid." Simultaneously with the enactment of this general standard, Congress, in the Clayton Act, specified certain types of competition as unlawful—one of them, § 3, 15 U.S.C.A. § 14, to "fix a price charged * * *, or discount from, or rebate upon such price", in the case of sales or leases in commerce, "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller", where the effect may be to substantially lessen competition or tend to create a monopoly. Relevant also is the provision in § 14, Third of the Shipping Act of 1916, 46 U.S.C.A. § 812, making it unlawful for the water carriers regulated thereby to "Retaliate against any shipper" by refusing space "or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason", a provision held in Federal Maritime Board v. Isbrandtsen Co., Inc., 1958, 356 U.S. 481, 78

S.Ct. 851, 2 L.Ed.2d 926, to place a "dual rate" system dependent on exclusive patronage beyond the Maritime Commission's power to approve. We do not mean either that the general words in the National Transportation Policy, "unfair or destructive competitive practices", condemn *per se* all arrangements like those branded by express language in § 3 of the Clayton Act and in § 14, Third of the Shipping Act or, on the other hand, that the words of the Policy were limited to the precise practices so previously proscribed; we do mean that these earlier statutes give an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission, in the exercise of its informed judgment, to decline to countenance.

If this be sound, it is reasonably clear both that the Commission was authorized to find that a tariff such as that here filed by the Central was an "unfair or destructive competitive practice" and that the Commission's Report was adequate to that end. Plainly such a tariff would violate § 3 of the Clayton Act if that applied to services; it would be no defence either that no penalty other than loss of the discount would be suffered by using the services of competitors, see Carter Carburetor Corp. v. F. T. C., 8 Cir., 1940, 112 F.2d 722, 732, or that competitors could employ the same device, see F. T. C. v. R. F. Keppel & Bro., supra, 291 U.S. at pages 312-313, 54 S.Ct. at page 426. The effect of such a contract upon competition is quite different from that of mere reduction in charges. In the latter case a competitor who meets the reduction is in as good a position to compete as theretofore; here, even if he meets the contract tariff with a similar one, he has some initial handicap, and whichever competitor gets the traffic, the other is then in a poor position to compete. All this would be a valid consideration for the Commission if only competing railroads were involved; it is doubly so in view of Congress' direction in the National Transportation Policy "to recog-

nize and preserve the inherent advantages of each" mode of transportation.[2]

Taking the Commission's other conclusion, that a general adoption of contract tariffs "would be the destruction in large measure of what is in general a just, reasonable and otherwise lawful rate structure necessary to maintain an adequate national transportation system," the Central criticizes this as contrary to a statement, in United States v. Chicago, M., St. P. & P. R. Co., supra, 294 U.S. at page 509, 55 S.Ct. at page 466, that "The threat of such a [rate] war may be a reason for rejecting a new schedule" only "if the rate relation previously existing is a fair one, or * * * if the commission is without power to avert the reprisals and thereby nullify the threat." It contends that the Commission had no basis for finding the country-wide rate structure to be "in general just, reasonable and otherwise lawful", and also that the Commission has ample power to stop the spread of contract rates whenever it should find they were having a harmful effect. This is to apply Mr. Justice Cardozo's words to a situation wholly different from that to which they were addressed. The schedules that had been cancelled by the Commission in the Milwaukee cases involved no novel rate-making principle; they reduced the rates between certain Indiana mines and certain Illinois points so as to restore a relationship between the Indiana mines and mines near Springfield, Illinois that had long existed until upset by a series of

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[2] We see no inconsistency, such as the Central does, between this reasoning and the Commission's having not merely permitted but prescribed commutation fares, Passenger Fares between District of Columbia and Nearby Virginia, 258 I.C.C. 559, 569-570 (1944). Without going into other factors distinguishing commutation fares, it is enough that such fares involve savings in sales expense, consistency of use, or both, not here demonstrated, and that the National Transportation Policy could hardly be read to have made a differential long permitted by § 22 of the Act, 49 U.S.C.A. § 22 into an "unfair or destructive competitive practice."

other rate changes initiated by a decrease in the Illinois intrastate rates. Quite naturally, the Court insisted that the new schedules ought not be cancelled unless and until the Commission found that a rate relationship differing from the historic one was a fair "rate relation", and that this conclusion was not to be gainsaid because of a threat of further reduction in the Illinois rates, which were "subject to the power of the Commission, which may keep the changes within bounds." The Court scarcely meant by all this to say that the Commission was powerless to prevent a novel rate making practice, which it believed would undermine the historic rate structure whereby carriers may freely compete for particular shipments on the basis of price and service, a structure the Commission might competently conclude had served the national interest generally, unless it was able to and did find that every single rate in that structure was precisely fair and reasonable. Similarly, although allowing the instant rates to become effective would, of course, not preclude the Commission's taking contrary action in the future, the Commission was not compelled to permit the experiment, even if we assume it might lawfully have done so. There was no showing of circumstances uniquely demanding or justifying this practice with respect to the movement of rugs and carpeting from Amsterdam to Chicago. Indeed, the matter seems rather to have been presented as a test case; as stated in the Report, p. 252, "The respondent concedes that if these rates are approved it will extend contract rates to other points and other commodities, and the motor carriers flatly state that they will follow."

One other contention of the Central must be mentioned. It calls our attention to a statement by then Chairman Freas before a subcomittee of the Senate Committee on Interstate and Foreign Commerce, in the hearing which led to the Transportation Act of 1958, 49 U.S.C.A. § 1231

et seq., 72 Stat. 568, 85th Cong., 2d Sess. Part 3, pp. 1899-1900, in which, after referring to the contract rate practice "now invoked in Canada and in some of the other foreign countries", the Commissioner said "there was nothing in the law now to prevent it so long as the rate adjustment does not create undue discrimination or preference and prejudice" and "our specific recommendation * * * is that there is nothing for the Congress to do." This, says the Central, is quite inconsistent with the Commission's Report here, holding, over Commissioner Freas' dissent, that there is something "in the law to prevent" the proposed rates even though these have not been found to violate §§ 2 or 3 or the Elkins Act. One can readily understand that, after the Commissioner's statement, the Central might have expected a more favorable reception of its proposal. However, even passing the points that Chairman Freas' remark was addressed to "agreements with shippers for lower rates * * * where justified by savings in cost in return for a guaranteed quantity of tonnage or guaranteed proportions of the shipper's total volume", savings not shown here, and that he also characterized this as "a highly controversial matter and one on which the Commission has not had occasion to express itself", it would be distilling sunbeams from cucumbers to say that such a statement before a Senate subcommittee constituted an administrative construction of the National Transportation Policy binding either *ex proprio motu* or because of the Congressional inaction it may have helped to induce.

The United States, the Commission and the intervening motor and water carrier defendants have presented other contentions in support of the order which we find it unnecessary to consider. The injunction is denied and the complaint dismissed.

Appendix A.

29350

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. 7250

CONTRACT RATES ON RUGS AND CARPETING FROM AMSTERDAM, N.Y., TO CHICAGO

Decided February 13, 1961

Proposed contract rates on rugs and carpeting from Amsterdam, N.Y., to Chicago, Ill., found unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy. Schedules required to be canceled, and proceeding discontinued.

Robert D. Brooks, Alfred A. Green, and *William C. Leiper* for respondent.

Clyde B. Aitchison, John R. Turney, and *Frederick A. Babson, Jr.,* for protestant motor carriers.

John H. Eisenhart, Jr., Wesley A. Rogers, James L. Givan, and *Harry C. Ames* for protestant water carriers.

George H. Kinney for intervener in support of respondent.

C. J. Braun for intervener in support of protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Pursuant to an agreed order entered herein, special rules of procedure were followed. All evidence was submitted in the form of verified statements, and an examiner's pro-

posed report was waived. Oral argument has been heard. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The respondent, The New York Central Railroad Company, by schedules filed to become effective on September 30, 1959, proposed to establish reduced rates[1] on rugs and carpeting, in carloads from Amsterdam, N.Y., to Chicago, Ill. Upon protest of various motor and water common carriers and associations thereof, the operation of the schedules was suspended to and including April 29, 1960, when they became effective.

The proposed contract rates are 155 cents, minimum 30,000 pounds, and 125 cents on weight in excess of that minimum. The tariff contains the form of a contract which must be executed by the shipper and filed with the respondent's tariff-publishing agent as a condition precedent to the application of the rates. According to its terms, for a period of 1 year the shipper must agree to move at least 80 percent of its Amsterdam-to-Chicago traffic over the lines of the respondent. The shipper is required to furnish an indemnity bond guaranteeing the payment of the higher noncontract rates which would become effective in the event the shipper should default in performance. The shipper agrees to permit inspection of pertinent shipping data in its records, and, at the end of the contract term, to furnish the respondent an affidavit setting forth the total tonnage shipped by all modes of transportation.

The agreement prohibits the respondent from voluntarily increasing the contract rates during the term thereof, and permits the shipper to cancel, without the payment of any further charges, if the respondent fails to deliver 70 percent of the traffic at Chicago on or before the sixth morning after its receipt at Amsterdam. The contract rates

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[1] Rates are stated per 100 pounds.

are available to all shippers or receivers willing to execute the contract. Other provisions concern renewal of the contract and its suspension during periods of strike and other emergencies.

The protestants urge that the proposed rates are contrary to the national transportation policy, are unjust and unreasonable in violation of section 1 of the act, are unjustly discriminatory contrary to section 2, create undue preference and prejudice in contravention of section 3, violate the Elkins Act by unlawful concessions or advantages, and are proscribed by certain of the antitrust laws.

There are presently published on this traffic rail rates of 266 cents, minimum 14,000 pounds; 185 cents, minimum 24,000 pounds, with a rate of 148 cents on weight in excess thereof (at which recent rail traffic has moved); and a piggyback rate of 185 cents, minimum 24,000 pounds. The current motor-carrier rate also is 185 cents, minimum 24,000 pounds.

The supporting shipper is the largest firm in the rug and carpet industry, having six plants located at points other than Amsterdam. The shipper's witness stated that in supporting the proposed rates he spoke on behalf of that industry generally. The commodities originate at eight additional points in eastern-central territory, each of which is served by at least one railroad and by numerous motor carriers.

At one time all of this traffic moved over the lines of the respondent. Between 1955 and 1958, its participation declined from 913 to 159 carloads. These articles are included in commodity group 713, manufactures and miscellaneous freight, and the respondent presented data establishing its declining participation in such traffic from 1948 to 1958. On the other hand, the protestants submitted data covering the period from 1937 through 1958, indicating that the respondent's participation in the considered traffic has increased, and they maintain that its declining volume

of manufactures and miscellaneous traffic is due principally to a geographical shift in industry from the East to the South and West. In view of our ultimate findings, it is unnecessary to consider further these conflicting contentions.

There is no dispute as to the compensativeness of the proposed rates. Our determination in this proceeding depends chiefly on whether the rates are lawful in the manner of their publication.

The respondent asserts that traditional ratemaking practices have failed to halt diversion of the traffic. It insists that, except for the contract feature, the rates in question are merely another form of incentive rates, and that the idea of contract rates is not new, referring to passenger commutation fares, contracts for hauling circuses, and various intrastate contract rates. It is presently participating in so-called agreed charges in Canada, which it claims are constructed on a basis similar to that of the proposed contract rates. General arguments referring to the passage of the railroads' monopoly position, the growth of for-hire and private motor transportation, and other matters bearing on changes in the general economy are made. These arguments are directed mostly to the contention that existing ratemaking principles and standards of lawfulness should be changed. Our attention here, however, is focused on the question whether the rates are lawful under the existing statute.

The agreed charges in Canada are authorized by special legislation enacted in 1938 and inspired originally by provisions in the British Road and Rail Traffic Act of 1933, which inaugurated this departure from orthodox ratemaking. Report of Royal Commission on Agreed Charges, 1955, pages 13, 33. Such charges were specifically authorized to aid the railroads to cope more effectively with competition from other modes of carriage, especially motor transportation, which is relatively free from regulation in Canada.

Appendix A.

Basically, the respondent argues that contract rates are an appropriate method of recognizing the economic difference to a railroad of "consistent" and "stand-by" use of its services, as reflected, for example, in the sale of commutation passenger tickets. Such tickets are based on the principle of mass transportation. The proposed rates are not dependent upon the tender of any specific volume (as opposed to percentage) of traffic. Moreover, commutation tickets are specifically authorized in section 22(1) of the act, viz: "* * * nothing in this part [part I] shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets; * * *." The same section provides that nothing shall prevent the giving of reduced rates for the transportation of property in emergencies (if authorized by an order containing specific details), and that no carrier shall be deemed to have violated the provisions regarding undue or unreasonable preference or unjust discrimination "by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order * * *." The existence of commutation passenger tickets affords no legal basis for the contract rates on property here under investigation.

The respondent maintains that it is seeking to avoid "a destructive and prohibitive cost that attaches to a standby carrier service"; that it is attempting reasonably to classify the traffic on the basis of the difference in consistent and standby service. Under the contract rates, it asserts that it would be able to recapture lost traffic and at the same time preserve its revenues from other traffic hauled under different conditions.

Classification of articles, in carloads, among other things, reflects density, value, susceptability to loss and damage, and the quantity which on the average can be tendered as one shipment. Volume of movement also is important, but not the percentage of the total movement in a given period regardless of the volume. As stated, the proposal rests

on a percentage basis over an extended period, without reference to the tonnage offered other than the carload minimum. Thus, no sound classification basis appears for different rates on the same or substantially the same tonnage, dependent only on the proposed contractual arrangement. Under present ratemaking practices, a "consistent" shipper of one shipment per month should be accorded a rate no different from that available to another shipper who in the same year makes 12 shipments of the same commodity from and to the same points, all in 1 month.

These contract rates would be available to any shipper willing to pledge 80 percent of its traffic. Thus, they are not subject to the objection that they favor the large over the small shipper. Nevertheless, the proposal fails to conform to statutory standards of lawfulness, as herein explained.

In *Forwarder Rates Conditioned upon Aggregates of Tonnage,* 264 I.C.C. 225, 231, division 2 stated:

> It is settled that difference in the quantity shipped as a single shipment may justify a fair and reasonable difference in transportation rates. This difference is usually justified by a showing of a lesser cost of service for a larger than for a smaller shipment, other things being equal. * * * The mere fact that a single patron offers a transportation company a specified amount of freight in varying quantities and at different times during a period of 1 year cannot under the cost of service theory justify a basis of rates different from those applied to a single shipment, *for the aggregate amount shipped or to be shipped in the 12-month period has no relevant bearing on the cost of a particular shipment.* [Emphasis added.]

And in *Molasses from New Orleans La., to Peoria and Pekin, Ill.,* 235 I.C.C. 485, wherein multiple-car rates were first approved, it was stated (page 498):

> It is well settled that differences in the quantities shipped as a *single shipment* may afford a fair and reasonable basis for differences in transportation rates. [Emphasis added.]

In the latter case, the rates approved were designed to meet barge competition whose unit of transportation was

not limited to single carloads and the advantage in large shipments was thus already in existence. The record showed that the railroads could move molasses in multiple-car quantities at a materially lower cost than they could move single carloads. There is here no showing of any material cost advantage to the respondent under the proposed rates as compared with like shipments moved from and to the same points by noncontracting shippers at the higher rates. Should these contract rates become effective, it would be entirely possible for a shipment from a contracting shipper to be transported at the lower rate in the same train between the same two points with a shipment of equal or greater volume from a noncontracting shipper, without any discernible difference in transportation circumstances.

There are certain conditions under either of which the assessment of different charges for the same haul between the same points may be justified: (1) where the lower charge reflects a lower cost of performing the service on one shipment than on another for which the higher charge applies; (2) where the total transportation services rendered the shipments are different; or (3) where in other respects the circumstances directly affecting the transportation of the respective shipments differ materially. The principle upon which the respondent attempts to justify these contract rates does not appear to be susceptible to translation into cost-of-service data. There is no contention that the total transortation services performed for the contracting shipper would differ materially from those for the noncontracting shipper, and no other circumstances directly affecting the transportation of the respective shipments are shown to differ materially. On the contrary, it does appear that, since the volume of traffic tendered by a shipper is not a factor, an 80-percent user with relatively little total volume could be accorded lower rates than a 50-percent user with a much larger volume. The wholly

arbitrary nature of the 80-percent figure as a dividing line between those entitled to reduced rates and those not so entitled may be further illustrated. For example, so far as this record indicates, there is no rational basis for affording an 80-percent user a 13-percent reduction in the normal rates on a 40,000-pound shipment, as here proposed, while denying the reduction to one who is a 70-percent or a 75-percent user. On the other hand, if the 80-percent user is entitled to such a reduction, it would be difficult to deny a 90-percent or a 100-percent user a still greater reduction. Moreover, it does not necessarily follow that one who agrees to ship 80 percent of his total yearly tonnage over the respondent's line would be a consistent user of the respondent's services in any meaningful sense; that is, there is no assurance that an 80-percent user would ship a regular and predictable volume of freight per day, week, or month. Nor is there any showing that the 80-percent requirement would produce that result where a lesser figure would not.

The instant situation differs substantially from that in other proceedings in which so-called volume rates were approved. Thus, in *Coal from Ky., Va., and W. Va. to Virginia,* 308 I.C.C. 99, reduced rates on bituminous coal conditioned upon the receipt by the consignee of a specified minimum tonnage during a stated period, were approved. The reduced rates were found necessary for the respondents to retain traffic which otherwise would have been lost by the construction of a mine-mouth generating plant by the utility using the coal for which the reduced rates were established. To the same effect is *Coal from Ill., Ind., and Ky. to Illinois and Indiana,* 308 I.C.C. 673, wherein approval was given to multiple-car rates on bituminous coal from midwestern mines to Chicago, Ill., and points grouped therewith. Recently, in *Coal to New York Harbor Area,* 311 I.C.C. 355, we approved reduced rates on bituminous coal to electric utilities conditioned upon the receipt

of at least 500,000 tons annually, the reduction applying on amounts over specified volumes. Those rates were aimed at preventing the loss of important coal volume, now moving to such utilities, to offshore residual oil.

In none of the foregoing proceedings did it appear that the approved rates would have a destructive effect upon other rates. The situation here differs. The respondent concedes that if these rates are approved it will extend contract rates to other points and other commodities, and the motor carriers flatly state that they will follow. If this occurred between points on the lines of the respondent and the competing motor carriers, it could be expected to spread to other railroads and motor carriers, and eventually to encompass much or most of the traffic of the country. The end result, in our judgment, would be the destruction in large measure of what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system. Such a destructive effect upon the general rate structure may not be countenanced without strong and compelling reasons, which are absent here.

Moreover, the provision in the contract that no increase could be made in the contract rates during the effectiveness of the contract unless otherwise ordered by the Commission, even though changed conditions might warrant such an increase, appears to be inconsistent with the continuing obligation of common carriers to establish and maintain just, reasonable and otherwise lawful rates.

The protestants contend also that these contract rates violate the Sherman antitrust law. In *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79, the Court pointed out that we have no power to enforce the Sherman Act or to decide definitively whether a particular matter constitutes a restraint of trade or an attempt to monopolize which is forbidden by that act, and that the policies expressed in the Interstate Commerce Act and other legislation dealing

specifically with transportation facilities and problems must be the basic determinants of our action. Continuing, the Court made it clear that while the policy of the antitrust laws determines the "public interest" in railroad legislation only in a qualified way, we may not ignore that policy as a relevant factor in fostering the objectives of the national transportation policy, which is our guide to the "public interest," *id.*, pages 80, 82-86. Thus, while a determination by us under the Sherman Act would be wholly gratuitous, we may not be unmindful of the general policy of the antitrust laws in favor of competition in applying the standards of the Interstate Commerce Act.

By the terms of the national transportation policy, we are required to administer the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each mode of transportation, and to encourage the establishment and maintenance of reasonable charges for transportation services, "without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." The policy further provides that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." See *Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 87-88; *Eastern-Central Motor Carriers Assn.* v. *United States,* 321 U.S. 194, 205-206; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 82-83. Thus, the policy gives meaning and content to the standard, among others, of "just and reasonable" referred to in sections 1 and 15(7) of the act.

The inevitable effect of a substantially exclusive patronage contract such as is involved here, considering especially the contractual conditions described herein, is to destroy competition for the duration of the contract. During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior

transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor. We are directed by the national transportation policy to "preserve" the inherent advantages of the various modes not to approve contracts which prevent the effective assertion of those advantages. These are matters which may not be ignored. As indicated, the respondent advanced competitive necessity as a justification for its contract rate proposal. However, where lower rates on traffic, all of which moves under substantially similar transportation circumstances, are necessary to regain or retain traffic, the remedy of reducing regularly published rates is available and should be used.

In view of our conclusions under section 1 of the act, there is no need to consider further the allegations under sections 2 and 3, and under the Elkins Act.

Constructive ratemaking innovations by carriers are desirable so long as they are consistent with the standards of lawfulness in the act and the national transportation policy. As in all other situations, the lawfulness of innovations of this kind must be determined based on the controlling circumstances in particular situations.

We find that the contract rates under investigation are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act. An order will be entered requiring their cancellation, and discontinuing the proceeding.

COMMISSIONER MURPHY, concurring:

I agree with the findings and conclusions of the majority except that I would also find that the rates under investigation are in violation of sections 2 and 3, and the Elkins Act.

The proposal herein affords different treatment to contracting shippers and noncontracting shippers where no

dissimilar circumstances affecting the transportation exists. Also, the provision permitting shipper cancellation of the contract without payment of further charges where the carrier fails to deliver 70 percent of the shipments in any one month on or before the sixth morning, could conceivably be used to discriminate. Thus, it is evident that the proposed rates would be unjustly discriminatory in violation of section 2 of the act.

Further, it would be entirely possible for a shipment from a contracting shipper to be transported at the lower rates in the same train between the same origin and destination with a shipment of equal or greater volume from a noncontracting shipper and the latter charged a higher rate. In my opinion this practice is preferential and prejudicial in violation of section 3.

Section 1 of the Elkins Act makes it unlawful to offer, to grant, to give, or to solicit, to accept, or to receive, any rebate, concession or discrimination in respect of the transportation of any property in interstate commerce by any common carrier subject to the Interstate Commerce Act, whereby any such property shall by any device whatever be transported at a less rate than the published tariff rate, *or whereby any other advantage is given or discrimination is practiced.* [Emphasis added.] The contract rates here, being based on no identifiable difference in transportation circumstances, amount to a concession to a contract shipper whereby an advantage is given or discrimination is practiced within the meaning of that act.

COMMISSIONER WALRATH, whom COMMISSIONER WEBB joins, concurring in the result:

Were it not for my conception of our obligation under the national transportation policy, I would join my Brother Freas in his dissenting expression. That policy, however, encompasses a system by "water, highway, and rail, as well as other means, adequate to meet the needs

of * * * commerce * * * and of the national defense." Contract rates could well mean the end of a national transportation system, either as we have known it (highly workable despite its imperfections), or, as many hope to see it, a truly coordinated system featuring the use of each mode of carriage under single billing—in essence, an optimum combination of the inherent advantages of each according to the needs of the traffic and the desires of the shipper. It seems improbable that such can be achieved or maintained if common carriers of the separate modes may by ontract tie desirable traffic to themselves.

This is far from saying, however, that the proposal fails to reflect "sound classification basis," "cost advantage," or "discernible difference in transportation circumstances." Since this is a case of first impression, I would have preferred that the report not include gratuitous dissertation implying that the proposed rates are unjustly discriminatory and unduly preferential and prejudicial within the meaning of sections 2 and 3 of the act.

All in all, I am reluctantly constrained to agree with the result reached by the majority. And although, by no means certain that I would reach that result in all cases involving contract rates, I am persuaded that general approval of this method of ratemaking should not be extended in the absence of appropriate legislation by the Congress.

COMMISSIONERS WINCHELL and MCPHERSON concur in the result.

COMMISSIONER FREAS, whom COMMISSIONER HERRING joins, dissenting:

Subject to certain overriding limitations prescribed by law in the public interest, the present regulatory scheme provided by the Congress leaves the full measure of responsibility for the initiation of rates upon the carriers

themselves. We have exhorted carrier management to consider carefully the matter of their transportation pricing practices. Clearly we cannot permit a publication that is unlawful, but we may be expected to allow experimentation within legal limits.

Only experience would demonstrate whether the proposed method would satisfy the expectations of its proponent. It may be expected that if it were permitted here others would resort to counteracting measures. By condemning the practice upon its inception, the question of its efficacy will necessarily remain unresolved.

It is the duty of the Commission in appropriate proceedings such as the one here involved to examine rate proposals to determine their lawfulness, but it is not our function, in the absence of illegality, to substitute our judgment for that of the carriers with respect to the wisdom of their proposals. Our problem here is to determine the legality or illegality of the course management, in its discretion, has decided to pursue. The sole question is, or should be, "Is the filed tariff unlawful and, if so, in what respect?"

It is clear that the motive for respondent's action is provided by the existence of intense competition between carriers, but the desire to improve one's competitive position is not condemned by the specific statutory provisions we administer, by the national transportation policy, or by the Elkins Act. In fact, it is the declared policy of the law that competition is to be encouraged. Only when competition becomes unduly destructive is it to be restrained. It is important to note the word "unduly," for any competition tends to be destructive of competing interests in some degree.

The majority states: "At one time all of this traffic moved over the lines of the respondent. Between 1955 and 1958, its participation declined from 913 to 159 carloads." An attempt by means otherwise lawful to stem such diversion or to regain traffic already lost can hardly be called

unduly destructive. The majority, however, is concerned with a feared destructive effect upon "what is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system." There is no evidence here before us establishing that under conditions then obtaining the rate structure at the time the proposal was made was the precise one or the only one "necessary to maintain an adequate national transportation system." Nor is there anything in this record to indicate that any shipper would actually forego the inherent advantages of motor transportation on virtually all of its traffic merely by reason of the establishment of the proposed contract rates which apply to carload traffic only. The proffered rates are admittedly compensatory. As urged by respondent, they should promote the consistent and better utilization, acquisition and maintenance of facilities and thus reduce the cost of performing the service.

The majority states that the rates "are not subject to the objection that they favor the large over the small shipper," but finds that the proposal "nevertheless * * * fails to conform to statutory standards." In support of this finding it quotes from *Forwarder Rates Conditioned upon Aggregates of Tonnage, supra,* and from *Molasses from New Orleans, La., to Peoria and Pekin, Ill., supra,* to the effect that different rates on a specified amount of freight under stated conditions are not justified "under the cost of service theory." Conceding this, it is far from saying that they are not justified under any theory. There is nothing in this record to show that rates are extended to any one shipper and withheld from others under like conditions, and no shipper is complaining. The same is true with respect to the allegation of undue preference and prejudice.

It is argued that "it would be entirely possible for a shipment from a contracting shipper to be transported at

the lower rates in the same train between the same two points with a shipment of equal or greater volume from a noncontracting shipper" and the latter charged the higher rates. This in itself does not constitute a violation of the act. Nor does the charging of lesser amounts on given shipments than on others of like commodities in equal or greater amounts transported in the same train between the same points introduce an innovation in transportation pricing. The situation has obtained over the years. It is encountered, by way of example, in the pricing of overflow shipments authorized by the governing freight classifications. The majority, however, in addition states that the difference in charges is "without any discernible difference in transportation circumstances." But traffic which assures or occasions an overall improvement in efficiency or economy in the performance of certain operations has been found to warrant a difference in treatment, ratewise, from that accorded to other freight, even though consisting of identical commodities moving in the same quantities from and to the same points. See *Return Load Rule—Emery Transp. Co.,* 310 I.C.C. 473; and compare *Consolidation of Freight Forwarder Shipments,* 310 I.C.C. 191. An attempt is made here by the majority to distinguish three recent cases involving coal, but the factors stressed there do not appear to be wholly relevant to this particular argument. Furthermore, neither the indicated contingency nor the relationship of the total qualifying annual tonnage to the cost of handling either single shipments or of handling a similar aggregate volume moving under ordinary rates during a corresponding period, was considered important enough in No. 32871, *Coal to New York Harbor Area, supra,* to prevent there the approval of what, in effect, are contract rates. It is odd that in the latter proceeding the various and different specified minimum qualifying annual tonnages provided for obtain-

ing the benefit of the lower rates were not deemed sufficient to condemn the rates, whereas here the majority seems to indicate that the required uniform percentage of a shipper's annual traffic does lead to unlawfulness. The 80-percent judgment figure is no more arbitrary, in my opinion, than the innumerable other specific limitations contained in tariffs regarding volume and level of rates.

The terms of the proposed bilateral agreement that the shipper, as consideration for his undertaking to offer 80 percent of the traffic, be assured of a minimum quality of service for most of his shipments, insofar as time in transit is concerned, and of a firm rate during the relatively short period of 1 year, seem to me to be reasonable provisions not affecting the basic lawfulness of the proposal.

I have reviewed what appear to be the controlling bases for the majority's findings as set forth in the report. I fail to see how the proposed rates may be either destructively competitive or unjust and unreasonable. I consider the findings unsupported.

APPENDIX B

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Proof of Service

I, Robert D. Brooks, one of the attorneys for The New York Central Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of October, 1961, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and to Michael I. Miller, Esq., Attorney, Department of Justice, Washington 25, D. C. and to Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York City.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Waterways Freight Bureau, The National Motor Freight Traffic Associations, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., The American Waterway Operators, Inc., and the Great Lakes Ship Owners Association, intervening defendants, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, as follows

   To Harry C. Ames, Esq., Attorney for Waterways Freight Bureau, Transportation Building, Washington 25, D. C.

Proof of Service.

To Frederick A. Babson, Jr., Esq., Attorney for National Motor Freight Traffic Associations, Inc. The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate Motor Freight System and Roadway Express, Inc., 2001 Massachusetts Avenue, N. W., Washington 25, D. C.

To John H. Eisenhart, Jr., Attorney for American Waterways Operators, Inc., and the Great Lakes Ship Owners Association, Inc., Suite 411, 1025 Connecticut Avenue, N. W., Washington 6, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE NEW YORK CENTRAL RAILROAD COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO LINES, INC., INTERSTATE MOTOR FREIGHT SYSTEM, ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, THE AMERICAN WATERWAYS OPERATORS, INC., AND THE GREAT LAKES SHIP OWNERS ASSOCIATION,
Defendant-Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO AFFIRM

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Dated: November 7, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1961

No. 482

THE NEW YORK CENTRAL RAILROAD COMPANY,
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UNITED STATES OF AMERICA AND
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NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO LINES, INC., INTERSTATE MOTOR FREIGHT SYSTEM, ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, THE AMERICAN WATERWAYS OPERATORS, INC., and THE GREAT LAKES SHIP OWNERS ASSOCIATION,
Defendant-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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MOTION TO AFFIRM

Come now the National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate

Motor Freight System, and Roadway Express, Inc., appellee motor carriers and motor carrier associations; the Waterways Freight Bureau, The American Waterways Operators, Inc., and the Great Lakes Ship Owners Association, appellee water carrier associations; and move this Honorable Court to affirm the judgment of the United States District Court for the Southern District of New York on the ground that it is manifest that the questions on which this appeal is based are so unsubstantial as to need no further argument.

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Dated: November 7, 1961

IN THE

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v.

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Defendant-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF IN SUPPORT OF MOTION TO AFFIRM

The National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate Motor Freight System, and Roadway Express, Inc., appellee motor carriers and motor carrier associations; Waterways Freight Bureau, The American Waterways Operators, Inc., and The Great Lakes Shipowners Association, appellee water carrier associations; submit this brief in support of their motion, filed herewith, to affirm the judgment of the United States District Court for the Southern District of New York.

THE QUESTIONS ARE MANIFESTLY UNSUBSTANTIAL

That the lawfulness of contract freight rates poses a substantial question on which this Court has never passed is an assertion supported neither by fact nor probability. The Court's never having considered the issue would not alone render substantial the questions on this appeal, since novelty is not the pertinent criterion. There is no need to conjecture on probabilities, however, since the fact is that three times this Court has passed on the question of the lawfulness of the use of contract freight rates by interstate rail carriers, and three times this Court has held such rates unlawful.

In *Armour Packing Co.* v. *United States,* 209 U.S. 56, 80-82 (1908), in passing on a contract rate designed to cover freight shipped over a seven-month period, this Court expressly rejected the contention that "there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company." The following language of the Court rejecting the above contention is, in all respects, apposite to the instant case:

> It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of *one* rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the *only legal rate.* Any other construction of the statute opens the door to the possibility of the very abuses of unequal

> rates which it was the design of the statute to prohibit and punish. (Emphasis added.)[1]

In *Chicago & A. R. Co.* v. *Kirby*, 225 U.S. 155, at 166 (1912), a unanimous Court stated:

> "The broad purpose of the commerce act was to compel the establishment of reasonable rates and the uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error."

The advantage there condemned was expeditious service at a premium charge; while here, the discrimination is compounded by the offer of expeditious service at a *lower* charge. It is well-settled that carrier competition will not excuse unjust discrimination between shippers. *Wight* v. *United States,* 167 U.S. 512, 517 (1897).

In *New York, N. H. & H. R. Co.* v. *ICC,* 200 U.S. 361, at 391-2 (1906), a contract for the sale and transportation of coal by a railroad at a price insufficient to yield the published freight rates, after deducting the cost of purchase and delivery of the coal, was held unlawful, a unanimous Court stating:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism. . . ."

Two, more recent decisions of this Court, though not directly in point, are highly persuasive of the correct-

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[1] This Court upheld the conviction of the shipper for violation of the Elkins Act (49 U.S.C. § 41), reproduced in pertinent part as Appendix A to this brief.

ness of the decisions of the Commission and of the court below: In *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297 (1937), this Court, pointing out that the provisions of the Shipping Act of 1916[2] closely parallel those of the Interstate Commerce Act,[3] upheld a decision of the Secretary of Commerce that a contract rate system of a conference of water carriers was unreasonably discriminatory among shippers[4] as prohibited by that Act, and had resulted in establishment of a "practical monopoly" of the traffic involved.[5] Contrary to the contention of appellant here that contract rates are necessary to achieve consistency or stability of service and that the decision below is at odds with the Congressional action of committing the industry to regulation, this Court in *Swayne & Hoyt, supra,* found that the contract rate system was unnecessary to achieve stability of service for the very reason that Congress *had* committed to regulation the rates of the industry involved.[6] More recently, in *Federal Maritime Bd.* v. *Isbrandtsen,* 356 U.S. 481, 493 (1958), this Court held the same type of "dual rate" system of contract rates, whereby a shipper receives a reduced rate in return for his exclusively patronizing certain carriers, violates Section 14, Third of the Shipping Act of 1916 (46 U.S.C. § 812), which

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[2] 46 U.S.C. § 801 et seq.

[3] 300 U.S. at 303.

[4] Id., at 307.

[5] Id., at 306.

[6] Ibid.

prohibits a carrier's using "discriminating or unfair methods" designed to stifle competition.[7]

In the *Armour, Kirby,* and *New Haven* cases discussed above, this Court squarely held that a contract for the transportation of freight at a special rate strikes at the very heart of the Interstate Commerce Act,[8] namely, the non-discrimination provisions of sec-

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[7] In another case which turned on the same language of Section 14, Third of the Shipping Act, *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 889 (S.D.N.Y. 1951), *aff'd per curiam* 342 U.S. 950 (1952), the district court stated: "Dual-rate provisions which authorize arbitrary differentials are obviously not reasonable, for arbitrary conduct means unreasoned or unreasonable conduct, i.e., without reference to an adequate determining principle or standard; and unreasonable discrimination is the equivalent of 'unjust' discrimination. Consequently, here the rate proposed to be charged shippers who do not sign contracts are unreasonably, and therefore unjustly, discriminatory; and the dual rate provisions which permit such rates are invalid." The Commission, in the instant case, in effect found that the differential between the rates charged contracting shippers and non-contracting shippers is arbitrary when it found that "no sound classification basis appears for different rates on the same or substantially the same tonnage, dependent only on the proposed contractual arrangement." (313 I.C.C. 247, at 250.)

[8] In still another case, *Kizer* v. *Texarkana & Fort Smith Ry. Co.,* 179 U.S. 199 (1900), a carrier and shipper contracted for the former to transport the latter's lumber over a period of time at an agreed rate. The shipper sued in a state court to recover the excess it paid over the agreed rate. The court refused relief on the ground that the contract violated sections 1, 2 and 3 of the Interstate Commerce Act. This Court dismissed the writ of error for want of a federal question. And in *Union Pacific R. Co.* v. *Goodridge,* 149 U.S. 680 (1893), this Court held contract rates on coal, established by a five-year contract between shipper and carrier, to be unjustly discriminatory under a Colorado statute found by the Court to be "of the same nature as the Interstate Commerce Act, and like that was designed to prevent unjust discrimination and extortion in rates for the carriage of persons and property." (149 U.S. at p. 687.)

tion 2 and of the Elkins Act, the terms of which are reproduced as Appendices A and B to this brief. The fact that the Interstate Commerce Commission in the instant case found that such contract freight rates are also a destructive competitive practice, violating a provision of the Interstate Commerce Act which did not exist at the time the *Armour, Kirby,* and *New Haven* cases were decided, is consonant with the *Swayne & Hoyt* and *Isbrandtsen* cases. The point is that each time the question of contract freight rates of regulated common carriers has come before this Court, it has held such rates unlawful by virtue of either the Interstate Commerce Act or other statutory language essentially the same in meaning and purpose. It is unreasonable to expect the Court to overrule its prior decisions which appellant has not mentioned, much less questioned, and which, we submit, are dispositive of the instant case and warrant this Court's affirming the judgment of the court below.

I. Prior Administrative Interpretation

The fact that the Interstate Commerce Commission, in the 20 years during which it has been charged with the administration of the National Transportation Policy, has never held contract rates on freight to be a "destructive competitive practice" is explained by the fact that the Commission never had an opportunity to do so until this appellant sought to revive the practice which seemingly had been laid to rest by earlier decisions of this Court. It should be obvious that the making of freight rates pursuant to contractual negotiations between carrier and shipper involves more than a mere change of form in the manner in which tariffs are published. Thus, it is no comfort

to appellant if we agree that Congress, in proscribing destructive competitive practices, was concerned with rate substance, not merely the form of rate publication.

II. Grounds of the Administrative Action

The Commission concluded that contract rates, under the circumstances of this case, would constitute a destructive competitive practice such as contravenes the National Transportation Policy of Congress, and are, therefore, unjust and unreasonable rates, which are declared unlawful by Section 1 of the Interstate Commerce Act (49 U.S.C. § 1). Although the Commission made findings which would have permitted it to conclude that the proposed rates also violate Section 2 of the Interstate Commerce Act (49 U.S.C. § 2) and Section 1 of the Elkins Act (49 U.S.C. § 41(1)), it refrained from so doing. This should not aggrieve appellant.

The Commission clearly stated findings of fact to support its ultimate conclusion of law. It is significant that these defendant-appellees and the court below had no difficulty in agreeing that the Commission's conclusion that contract rates constitute a destructive competitive practice was based on its findings that such rates (1) would be destructive of the existing rate structure, and (2) would destroy the competition of other carriers for the duration of the contract period. Appellant's claim that the Commission failed clearly to articulate its findings resolves itself into a contention that the Commission committed legal error in not labeling the findings as such, listing them consecutively, and following them by the word "therefore," followed by a statement of its ultimate conclusion of law. We submit that no such requirement was incum-

bent upon the Commission and that, given the will, the findings may be ascertained with a minimum of effort.

III. Meaning and Application of the Legal Standard

Appellant complains that the Commission failed "to set forth or apply the standard of lawfulness" enunciated by the "destructive competitive practices" provision of the National Transportation Policy. This, appellant says, is the consequence of the Commission's having failed clearly to articulate the factual basis or bases which support its ultimate conclusion. We submit, as aforestated, that in support of its ultimate conclusion, the Commission stated clearly two basic findings of fact, either of which alone sustains the conclusion of law.

Moreover, appellant errs in assigning to the Commission the function of establishing the standard of lawfulness. Constitutionally, this is the non-delegable function of the legislative body; and the power of its creature, the agency, extends only to ascertaining whether or not the facts of a given controversy require application of the standard established by the legislature. *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126, 144-5 (1941). This, the agency has done.

The error of appellant's belief that the Commission failed to "go beyond the mere words of the statute in revealing the basis for their action,"[9] led to the confused claim that "since the court below could find no comfort in the Commission's report, it resorted to statutes other than the Interstate Commerce Act."

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[9] J.S., p. 12.

The court below referred to certain terms used by Congress in the Federal Trade Commission, Clayton, and Shipping Acts—not to compensate for deficiencies in the Commission's report—but, rather, to illustrate the error of appellant's argument that the term "unfair or destructive competitive practices" could not comprehend contract rates because such rates were not a problem when Congress enacted that term. The court below merely showed that, prior to enactment of that statutory language, Congress had used almost identical terms to outlaw practices which in form, substance, and intended results are identical to the one proposed here.

In being "not unmindful" of Congress' policy favoring competition, as expressed in the antitrust laws,[10] the Commission did no more or no less than this Court requires of it. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80, 82-6 (1944).

IV. Evidentiary Basis of Agency's Findings

Appellant's claim that the Commission's findings of fact are unsupported by substantial evidence of record overlooks the *uncontroverted* evidence which established (1) that appellant would offer contract rates to other shippers on its lines, which are extensive, (2) that motor carriers, in self-defense, would reply in kind, and (3) that appellant considers the prevailing principles of ratemaking "obsolete" in that the law "contemplates factors other than those which historically have been considered in connection with classifica-

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[10] 313 ICC at 253.

tion matters," which factors are comprehended, appellant asserts, by contract rates. Thus appellant's own evidence forced the conclusion that destruction of the existing rate structure in the surface transportation industry was the design, as well as the likely result, of the proposed rates.

The Commission was entitled to treat the existing nationwide rate structure as just and reasonable and otherwise lawful until the contrary was proved. Appellant cites *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935) as forbidding such action by the Commission, but that case is not applicable. There, (1) the rate relationship in issue involved only a few specific movements of traffic; (2) the historic rate relationship between those specific movements had recently been disrupted by a competitor; and (3) the proponent of the new rate sought to re-establish the pre-existing, historic rate relationship. Thus, the Commission was there in a position easily to ascertain the reasonableness of the pre-existing rate relationship. Moreover, this Court held that the Commission was precluded from assuming the reasonableness of the rate structure, not as it historically had existed, but as it existed following its disruption. Finally, in that case, involving as it did specific movements of traffic, the Commission had the power to prevent further rate reductions on that traffic in the future. Here, however, the issue is not merely the lawfulness of rates on a particular movement of traffic but, rather, a principle of ratemaking so fundamental as to have universal application once approved. Indeed, the Commission observed that appellant's "arguments are directed mostly to the contention that existing ratemaking principles and standards of lawful-

ness should be changed."[11] No such issue was involved in *United States* v. *Chicago, M., St. P. & P. R. Co.*, *supra.*

Ample evidence of record supports the Commission's other basic finding, *viz.*, that contract rates would destroy competition for the duration of the contract. Briefly stated, the evidence was that when the contract rate was published, the three appellee motor carriers collectively enjoyed approximately 65% of the involved traffic, but that the shipper intended to "return" this traffic to appellant upon approval of the contract rate. The shipper's intention and the Commission's prediction ripened into a reality when the rate went into effect after expiration of the seven-month statutory period of suspension.

Even in the absence of evidence that competition would be destroyed by the proposed rates, the Commission would have been justified in inferring as much from the very terms upon which the contract rate became operative. In *FTC* v. *Pacific States Paper Assn.*, 273 U.S. 52, 63 (1927), this Court upheld the Federal Trade Commission's finding, purely by inference, that use of price lists would lessen competition.

The Commission was under no obligation to find the relative competitive positions of appellant and its competitors, since the statute proscribing unfair or destructive competitive practices contains no exemption based on competitive position or otherwise. Moreover, it would seem that such findings, if made, would ill-serve appellant; since the evidence showed that even prior to the contract rate, it enjoyed a rate advantage on the particular traffic involved and a greater share thereof than any other carrier, rail, motor, or otherwise.

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[11] 313 ICC at 249.

CONCLUSION

For the reasons aforestated, the questions upon which decision of this cause depends are so unsubstantial as not to need further argument. The judgment of the court below should be affirmed.

Respectfully submitted,

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Dated: November 7, 1961

APPENDIX A

The Elkins Act, § 1, in part. 49 U.S.C. § 41(1). ". . . The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. . . ."

APPENDIX B

Sec. 2 of the Interstate Commerce Act. (49 U.S.C., § 2.) "That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered,

in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

PROOF OF SERVICE

I Frederick A. Babson, Jr., one of the attorneys for the defendant-appellees on whose behalf this Motion and Brief are filed, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of November, 1961, I served copies of the foregoing Motion and Brief in support thereof on the several parties to this appeal, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and to Michael I. Miller, Esq., Attorney, Department of Justice, Washington 25, D. C., and to Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York City.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On The New York Central Railroad Company, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert D. Brooks, Esq., its Attorney, 466 Lexington Avenue, New York 17, New York.

FREDERICK A. BABSON, JR.
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Defendant-Appellees

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No. 482

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In the Supreme Court of the United States

OCTOBER TERM, 1961

THE NEW YORK CENTRAL RAILROAD COMPANY,
APPELLANT

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., BOSS-LINCO, INC., INTERSTATE MOTOR FREIGHT SYSTEM, ROADWAY EXPRESS, INC., WATERWAYS FREIGHT BUREAU, THE AMERICAN WATERWAYS OPERATORS, INC., AND THE GREAT LAKES SHIP OWNERS ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on June 14, 1961, of a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325. The court below dismissed the complaint which sought to enjoin and set aside an order of the Interstate Commerce Commission dated February 10, 1961, ordering cancellation of a tariff proposed by appellant. The opinion of the district court (J.S. 15–26) is reported in 194 F. Supp. 947, the Commission's decision (J.S. 27–43) at 313 I.C.C. 247.

Appellant's tariff proposed a reduced rate on carload shipments of rugs and carpets from Amsterdam, New York, to Chicago, Illinois, which was below the established rates for such traffic. This reduced rate was to be available only to shippers which contracted to ship over appellant's lines at least 80% of their traffic in rugs and carpets moving from Amsterdam to Chicago during the annual period of the contract. The contract would also require each such shipper to furnish an indemnity bond guaranteeing the payment of the higher non-contract rates should the shipper default in performance. The shipper would be required to supply the carrier with an affidavit setting forth for the contract period the total tonnage of its rug and carpet shipments between the points involved by all modes of transportation. The contract would prohibit the carrier from voluntarily increasing the contract rates during the contract term, and would permit the shipper to cancel, without payment of any further charges, if the carrier failed to deliver 70%

of the traffic at Chicago on or before the sixth morning after its receipt at Amsterdam (J.S. 28–29).

The Commission issued a report [1] holding that the proposed contract rates were "unjust and unreasonable" under Section 1 of the Interstate Commerce Act, "in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act" (J.S. 36–37).[2] The Commission's conclusion was based on findings that (J.S. 36–37):

> The inevitable effect of a substantially exclusive patronage contract such as is involved here * * * is to destroy competition for the duration of the contract. During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor. * * *

The Commission also found that the proposed rates "would have a destructive effect on other rates," since they would result in a chain reaction among all other carriers, each seeking tying arrangements with shippers. The end result would be the destruction of the existing general rate structure

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[1] By stipulation a hearing examiner's report was waived and the case before the Commission was considered on verified statements.

[2] The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding § 1, is set forth at J.S. 44.

which, according to the Commission, "is in general a just, reasonable, and otherwise lawful rate structure necessary to maintain an adequate national transportation system" (J.S. 35). No "strong and compelling reasons" were shown to justify such destructive effect (J.S. 35); the railroad can meet its alleged competitive problem by using "the remedy of reducing regularly published rates" (J.S. 37).

The protestant motor and water carriers had urged that the proposed contract rates violated not only the national transportation policy but also Sections 2 and 3 of the Interstate Commerce Act, the Elkins Act and the Sherman Act (J.S. 29). Before considering the competitive impact of the rates, the Commission noted that while validity under the Sherman Act was not properly a separate issue in a Commission proceeding, the Commission "may not be unmindful of the general policy of the antitrust laws in favor of competition in applying the standards of the Interstate Commerce Act" (J.S. 35–36). Although the Commission discussed objections to the proposed rates under Sections 2 and 3 of the Interstate Commerce Act and the Elkins Act,[3] its report stated, just

[3] In that connection, the Commission noted that there was no element of cost-of-service savings by volume shipments or differences in transportation circumstance, which could justify the dual rates (J.S. 32–34). It also stated that the carrier's commitment, that no increase would be made in the contract rates during the contract period unless ordered by the Commission, appeared to be inconsistent with the continuing obligation of the carrier to establish and maintain just, reasonable and otherwise lawful rates (J.S. 35).

before reaching the ultimate findings, "In view of our conclusion under section 1 of the act, there is no need to consider further the allegations under sections 2 and 3, and under the Elkins Act" (J.S. 37).

Three commissioners joined in the report, and five commissioners concurred. Of the latter, one stated his concurrence in the report and indicated that he would also have found the proposed tariff in violation of the Elkins Act and Sections 2 and 3 of the Interstate Commerce Act (J.S. 37–38); two concurred in the result on the ground that the effect upon competing modes of transportation would be contrary to the national transportation policy but took exception to the report's "gratuitous dissertation" regarding Sections 2 and 3; and two concurred in the result without opinion. Two commissioners dissented (J.S. 39).

The three-judge district court unanimously sustained the Commission's decision. The court (per Circuit Judge Friendly) first noted that appellant's principal attack was on the adequacy and clarity of the findings and the alleged absence of a majority in support of any conclusion. The court held that the Commission's "ultimate conclusion is plain," and "even if we were to eliminate the votes of Commissioners Winchell and McPherson altogether [concurring in the Commission's result without opinion], six commissioners would have joined in concluding that the rates 'are unjust and unreasonable in that they constitute a destructive competitive practice within the meaning of the national transportation policy declared in the act' " (J.S. 21).

In construing the scope of the Commission's authority to prohibit "unfair or destructive competitive practices" under the national transportation policy, the court referred to cases construing analogous language under Section 5(a) of the Federal Trade Commission Act, Section 3 of the Clayton Act, and Section 14 Third of the Shipping Act, 1916 (J.S. 21–23) and pointed out that "these earlier statutes give an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission, in the exercise of its informed judgment, to decline to countenance." The court held, therefore, that "the Commission was authorized to find that a tariff such as that here filed by the Central was an 'unfair or destructive competitive practice' and that the Commission's Report was adequate to that end." The court stated (J.S. 23):

> The effect of such a contract upon competition is quite different from that of mere reduction in charges. In the latter case a competitor who meets the reduction is in as good a position to compete as theretofore; here, even if he meets the contract tariff with a similar one, he has some initial handicap, and whichever competitor gets the traffic, the other is then in a poor position to compete. All this would be a valid consideration for the Commission if only competing railroads were involved; it is doubly so in view of Congress' direction in the National Transportation Policy "to recognize and preserve the inherent advantages of each" mode of transportation.

The court also sustained the rejection of a rate-making practice "which [the Commission] * * * believed would undermine the historic rate structure whereby carriers may freely compete for particular shipments on the basis of price and service." In the court's view appellant had made "no showing of circumstances uniquely demanding or justifying this practice" (J.S. 25).

ARGUMENT

This case presents no substantial question requiring plenary review by this Court. Although the Commission might have rested its decision on one or more of several available grounds, it chose to rely on the congressional directive in the national transportation policy prohibiting "unfair or destructive competitive practices." It held that appellant's proposed dual rate system with the lower rates conditioned upon "substantially exclusive patronage" (J.S. 36) was unlawful because of its "inevitable" destructive impact upon competition (J.S. 36) and the absence of countervailing justification (J.S. 35, 37). The Commission found it unnecessary to pass upon other issues raised by the parties. The case, therefore, involves a narrow holding unanimously affirmed below, not "important and far reaching questions" about the legality of contract rates, as alleged by appellant (J.S. 6). The decision below was correct and should be affirmed.

Congress has expressly enjoined the Commission to administer and enforce all the provisions of the Interstate Commerce Act with a view to carrying out the

national transportation policy (54 Stat. 899; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 82–83). Accordingly, the Commission correctly ruled (J.S. 36) that, in determining whether proposed rates are "just and reasonable" under Section 1 of the Act,[4] it is bound to consider the objectives of the national transportation policy—"to recognize and preserve the inherent advantages" of all modes of transportation; and "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

Under these provisions, the Commission in passing upon the rates proposed for contracting shippers, clearly had to consider the effect of the dual rate upon competing carriers. There is no basis for appellant's contention (J.S. 7–8) that the Commission could look only at the rate level, and was barred from considering the effects of the "substantially exclusive patronage" upon which appellant's rates would be conditioned. Only by considering such effects could the Commission carry out its duty to prevent "unfair and destructive competitive practices." In addition, since appellant's competitors are in motor and water transportation, the Commission was required to consider the competitive effects of the proposed tariff in order to carry out the other above-stated objective of the national transportation policy, preservation of the

[4] Secs. 1 (4), (5), 49 U.S.C. 1 (4), (5).

inherent advantages of competing modes of transportation.[5]

Furthermore, the Commission and the court below correctly held that reference to the antitrust laws is appropriate in determining whether a practice is "unfair or destructive" to competition (J.S. 21–23, 35, 36). The teaching of *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 86–87, is that the Commission should not "ignore" the policy underlying the antitrust laws, since "[t]he preservation of independent and competing * * * carriers unquestionably has bearing on the achievement of those ends" of the national transportation policy.

The Commission and the court below did not "incorporate antitrust concepts" as a separate standard for "regulated carrier pricing" as appellant implies (J.S. 8). Rather, they referred to them for aid in the construction of the phrase "unfair or destructive competitive practices" in the transportation policy, just as the court also drew upon the analogy of the Shipping Act, 1916 (J.S. 22–23). Indeed, the decision

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[5] J.S. 23–24, 39. The court below, in another case, similarly held that the Commission in granting a certificate of public convenience and necessity, properly considered the allegation of "unfair competitive practices" under the national transportation policy, the requirements of which are a guide to application of the standards of the certificate section of the Act. *Luckenbach S.S. Co.* v. *United States*, 122 F. Supp. 824 (S.D. N.Y.), affirmed, 347 U.S. 984.

Appellant, by failing to raise before the Commission its contention that the Commission could not consider the effect of the dual rate on competition, may be precluded from asserting it here. Cf. *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33.

of this Court under the Shipping Act in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, is particularly relevant. There this Court held that the Maritime Board had improperly approved a dual rate system dependent upon exclusive patronage because it constituted a "discriminatory and unfair method" of eliminating competition. As the court below stated, the interpretations of these prior statutes applicable to competitive practices "give an idea of the kinds of competitive practices that Congress authorized the Interstate Commerce Commission, in the exercise of its informed judgment, to decline to countenance" (J.S. 23) and sustain the Commission's action in this case.

Contrary to appellant's further contention (J.S. 12–14), no substantial question exists as to the adequacy of the Commission's findings and their basis in the record. Testimony of officials of the supporting shipper and protesting carriers[*] supports the Commission's finding that the proposed rate was intended to, and would, divert traffic to the appellant from motor and water carriers by means of the "substantially exclusive patronage contract" upon which it was conditioned. Appellant would thereby obtain business, despite the "offer of superior transportation service at an equivalent or lower rate" by a competing carrier in a different mode of transportation (J.S. 23–24, 36–37).

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[*] See verified statements of Herbert F. Sixtus (R. 164–165) and Frederick G. Freund (R. 238).

Moreover, as the Commission and the court below found, there was no justification to outweigh these destructive effects on competition (J.S. 25, 35, 37). As the Commission pointed out, appellant can lower rates where "necessary to regain or retain traffic" by "reducing regularly published rates" (J.S. 37). Appellant's proposal, instead, to resort to exclusive dealing arrangements not only is destructive of competition but constitutes an unwarranted departure from the established pattern of ratemaking and carrier competition in this country (J.S. 24–25, 35). The Commission's finding as to the destructive effect on the rate structure is supported by statements of appellant and other parties cited in the report (J.S. 35).[7]

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[7] The court below properly rejected appellant's contention based upon *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 509, that the power to deal later with effects of a change in the rate structure required initial sanctioning of its proposal. In that case this Court required that the proposed rates be allowed to go into effect because there had been no finding that the existing rate structure was reasonable or that the proposed rates were unreasonable. The Commission made both findings here. See Statement *supra*, pp. 3–4. It specifically found the proposed rates to be unlawful because of their inevitable destructive impact upon competition and because, as the court below stated, they "would undermine the historic rate structure whereby carriers may freely compete for particular shipments on the basis of price and service." "[T]he Commission was not compelled to permit the experiment" in the absence of any "showing of circumstances uniquely demanding or justifying this practice" (J.S. 25).

Finally, appellant's contentions that the Commission's opinion "lacks * * * clarity" (J.S. 9–11) and fails "to clearly articulate" a general standard governing destructive competitive practices (J.S. 11–12) rests primarily, we believe, upon its reading of the Commission's discussion with regard to Sections 2 and 3 of the Interstate Commerce Act and the Elkins Act. Underlying appellant's jurisdictional statement on these points is its desire that the Commission should have made adjudications and findings under these other statutory provisions and ruled upon the validity of "contract rate" programs in general. The Commission, however, may choose to develop in a more cautious and pragmatic manner through case by case adjudication the validity of contract rates and their effects.

In this Court as well, there is no need or basis to decide whether the Commission's decision is sustainable on grounds or under statutory provisions other than Section 1 of the Interstate Commerce Act and the national transportation policy upon which it rested. Nor is there reason to determine whether other contract rates in other situations might be valid. The adjudication by the Commission that the proposed rates were "unjust and unreasonable" because they constitute an unfair or destructive competitive practice in violation of the national transportation policy is supported by Commission findings, and was properly sustained by the three-judge court.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

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Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO MOTIONS TO AFFIRM

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REPLY TO MOTIONS TO AFFIRM

I.

The uniqueness and importance of the issues.

The motor and water carrier appellees argue that this court in prior cases[1] has passed on the lawfulness of con-

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[1] *Armour Packing Co.* v. *United States*, 209 U. S. 56 (1908); *Chicago & Alton R.R. Co.* v. *Kirby*, 225 U. S. 155 (1912); *New York, N.H. & H. R. Co.* v. *I.C.C.*, 200 U. S. 361 (1906).

tract freight rates and therefore the issues here presented are not novel. These cases involved charges assessed by the carrier based on private agreements at variance with the legally published rate. In the instant case, the contract rate was published in accordance with Section 6 of the Interstate Commerce Act (49 U.S.C. Sec. 6), to alternate with existing published non-contract rates, which were not cancelled. It was thus available to all shippers and receivers to the same extent as all other duly filed and published non-contract rates. The cases cited by the motor and water carrier appellees all turned on the question of discrimination under Section 2 of the Interstate Commerce Act (49 U.S.C. Sec. 2), because the privately agreed upon rates in those situations applied only to individually favored shippers. These cases are not dispositive or even relevant to the issues presented in this proceeding since the instant contract rate was the duly published and legally applicable rate available to all shippers that chose to use it and also because the decision by the Commission herein does not even bring the issue of discrimination before this court.

The government argues that since the Commission's decision was based solely on the destructive competitive practices provision in the National Transportation Policy, this case involves a narrow holding "not 'important and far-reaching questions' about the legality of contract rates."[2] The fact that the Commission chose to condemn these rates as violative of the National Transportation Policy and thus Section 1 of the Interstate Commerce Act, in no way renders its decision less important and far-reaching to the transportation industry in general, and to appellant in particular. This decision is the Commission's first adjudication on this subject and while not specifically condemning contract rates *per se*, *it* cannot but have a substantial effect on whether or not carriers or shippers de-

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[2] Government's Motion to Affirm, p. 7.

siring the benefits of such rates must seek corrective legislation, particularly in the light of representations made by the Commission's Chairman to the Senate Committee considering the Transportation Act of 1958 (15 Stat. 572). (See appellant's brief in the court below, pp. 3-4, R. 630-631.) The importance of the questions presented requires plenary consideration by this court.

II.

The Commission's report and order lack the clarity requisite to a valid order.

Appellant has maintained both in the court below and in its Jurisdictional Statement that the Commission's report and order lack the clarity necessary for a valid administrative determination as defined by this court in *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U. S. 499, 511 (1935); *Beaumont, Sour Lake and Western Railway* v. *United States*, 282 U. S. 74, 86 (1930); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935); *Securities and Exchange Commission* v. *Chenery*, 332 U. S. 194, 196-7 (1947); concurring opinion of Frankfurter, J., in *Secretary of Agriculture* v. *United States*, 350 U. S. 162, 175 (1956). This argument is based primarily on the fact that it is not possible to ascertain with any degree of certitude which of the multitudinous Commission findings are actually intended to support its limited ultimate conclusion.

Motor and water carrier appellees assert that "given the will, the findings may be ascertained with a minimum of effort." (Carriers' Motion to Affirm, p. 10.) The holdings of the previously cited cases indicate that no such effort is required of the litigants or the courts. See *Securities and Exchange Commission* v. *Chenery, supra*, at 196-7.

In the court below, each of these carriers filed separate briefs, each brief differing as to which of the Commis-

sion's findings were intended to support its ultimate finding and none of which agreed with the two findings selected by the court below as the essential findings supporting the Commission's ultimate conclusion.[3] Likewise the government in both its brief and oral argument to the court below differed with the analysis of the carrier appellees and with the reasoning of the decision of the district court.[4] In its Motion to Affirm, the government now asserts at page 3 that the Commission's decision was based on the findings that:

> "* * * The inevitable effect of a substantially exclusive patronage contract such as is involved here * * * is to destroy competition for the duration of the contract. During the term of the contract, and especially during its final months, the shipper's vested interest in the reduced rate would discourage or prevent acceptance of an offer of superior transportation service at an equivalent or lower rate, nullifying any inherent advantages of other transportation agencies as a competitive factor." (313 ICC at 253).

The government then goes on to say that the Commission found the proposed rates would also have a destructive effect upon the rate structure, but the government does not state that this finding by the Commission was intended to support its ultimate conclusion under the National Transportation Policy. Thus, even at this stage in the proceeding, there is disagreement among the appellees themselves and the court below as to which Commission

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[3] The statement at page 9 of the carrier appellees' Motion to Affirm to the effect that appellant and the court below agreed on which of the Commission's findings supported its ultimate conclusions is incorrect. See appellant's brief in the court below, pp. 8-14 (R. 635-41), and its reply at p. 4 (R. 664) and particularly at the top of p. 12 (R. 672).

[4] See particularly transcript of oral argument in the lower court, pp. 36-42 (R. 843-849).

findings were intended by the Commission to support its ultimate conclusion. Appellant submits that this clearly demonstrates the soundness of its position that the report and order of the Commission lack the clarity requisite to a valid administrative determination and that this court should not permit such an order to stand, particularly where this determination by the Commission is its first on an important new rate-making innovation and is thus bound to have far-reaching consequences in the transportation industry.

III.

The Commission has misinterpreted and misapplied the destructive competitive practices provision.

Appellant has maintained that the Congressional purpose in enacting the destructive competitive practices provisions of the National Transportation Policy was to correct the then prevalent practice of cut-throat rate slashing. This position is buttressed by the fact that the Commission since the enactment of that provision in 1940 has consistently so applied it[5] and where questions concerned the manner or form of publication of rates, the other substantive provisions of the act were deemed controlling.[6]

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[5] See appellant's brief in the court below, p. 24 (R. 651). This policy of the Commission has been consistently applied even in its latest adjudications. See Investigation and Suspension Docket No. 7559, *Grain-Kansas City, Omaha and Related Origins to Lawrenceburg, Ind.*, I.C.C. (Decided November 2, 1961) where at page 6 of the mimeographed report the Commission said "The proposed rates are compensatory and no lower than necessary to meet the all-barge competition. Thus, there is no basis for saying that they constitute destructive competition."

[6] For example, in deciding the lawfulness of volume rates, Sections 2 and 3 of the Act have been the determining factors. See *Coal from Ky., Va. and W. Va. to Virginia*, 308 I.C.C. 99; *Coal from Ill., Ind. and Ky. to Illinois and Indiana*, 308 I.C.C. 673; and *Coal to New York Harbor Area*, 311 I.C.C. 355. It is submitted that the instant decision of the Commission is entirely inconsistent with the holding and rationale of these cases.

Appellees argue that the Commission in interpreting the destructive competitive practices provision of the National Transportation Policy looked to various provisions in the anti-trust laws in order to determine what types of practices were intended to be proscribed by the Congress when using similar terminology. (Government Motion to Affirm, pp. 9-10.) It is clear from a reading of the Commission's decision that the Commission did not do so and in fact there is no language in the decision which in any way indicates what factors the Commission did take into account in interpreting this phrase. If reliance was placed on interpretations of similar language in the anti-trust laws, it is equally clear that in applying any standard the Commission failed to consider factors which would have been relevant to a finding of destructive competitive practice under the anti-trust laws. Thus, the Commission refuses to even consider the line or amount of commerce affected by this rate[7] or the relative competitive positions of the competitors here involved.[8] A mere reading of the opinion of the court below and the report of the Commission demonstrates that the court below and not the Commission supplied the interpretation of the destructive competitive practices provision which is here being urged by appellees. It is submitted that this failure by the Commission to give any meaningful interpretation to the standard which it apparently intended to apply is error. *Dixie Carriers* v. *U. S.*, 143 Fed. Supp. 844, 850 (1956), reversed on other grounds 355 U. S. 179 (1957). Nevertheless, the interpretation by the court below, which of necessity incorporates anti-trust pricing criteria in judging an already regulated price structure, brings before this court important questions which should be fully considered. *Quare,*

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[7] See *Tampa Elect. Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

[8] See *Balian Cream Co.* v. *Arden Farms Co.*, 104 Fed. Supp. 896 (1952); affirmed 231 F. 2d 356 (1955); cert. den. 350 U. S. 991 (1956); rehearing denied 351 U. S. 729 (See 313 I.C.C. at 248-9).

are the courts or the Commission charged with the interpretation and application of this standard in any specific situation? See *FTC* v. *Gratz*, 253 U. S. 421, 427-8 (1920); Frankfurter, J. dissenting in *FTC* v. *Motion Picture Advertising Co.*, 344 U. S. 392, 404-5 (1953). In the instant case, the Commission's report lacks any of the findings that are essential in any case involving application of anti-trust standards, and if the courts are charged with interpreting and applying the destructive competitive practices provision, it is apparent from the opinion of the court below that it did not make any independent examination of the record in order to properly apply its standard.

Great weight has been placed by appellees on this court's decision in *Federal Maritime Board* v. *Isbrandtsen*,[9] 356 U. S. 481 (1958), as sustaining the Commission's action. It is submitted that *Isbrandtsen* has no relevance to this proceeding. That case involved a technical interpretation of a statute held expressly to proscribe the type of dual rate contract published by a carrier conference therein condemned. The court found it was the purpose of those dual rate contracts to coerce other carriers into joining shipping conferences (356 U. S. at 483, 494-5). In contrast, the instant contract rate was published by a single carrier and there is no contention by anyone that this rate was intended to coerce any competitor to take any action of any kind. The case turns on an interpretation of a statute not remotely resembling anything in the Interstate Commerce Act and affords no justifying basis for the Commission's action in this proceeding.

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[9] It is particularly significant that the Commission's decision does not even cite this case or in fact any of the antitrust decisions cited by the lower court.

IV.

The Commission's findings are insufficient to support its report and order.

The issues relating to the sufficiency of the Commission's findings and the invalidity of its order are emphasized by the improper interpretation given by the Government to *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1935). The footnote at page 11 of the Government's Motion to Affirm states that the court in *Milwaukee* required that the proposed rates be allowed to go into effect because there had been no finding that the existing rate structure was reasonable or that the proposed rate structure was unreasonable. Actually, *Milwaukee* holds that in order for the Commission to find a rate destructive of any given rate structure, it must find that: (1) the existing rate structure is reasonable, *and*, (2) the Commission must be without power to prevent further action having any destructive effect on that rate structure. In the instant case, of course, the Commission had no evidence before it upon which it could predicate a finding of reasonableness of the rate structure and the Commission's Report obviously could not validly satisfy the court's first requirement. Since the Interstate Commerce Act empowers the Commission to approve or disapprove of any rates published in response to the instant rate, this court's second requirement obviously remains unsatisfied.[10]

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[10] See *New York, N.H. & H. RR Co.* v. *U. S.*, Fed. Supp. (U. S. District Court—District of Connecticut, decided November 15, 1961). At mimeo page 17 the court states: "The Commission indicates, and the government insists, that a full-fledged rate war is the inevitable consequence of allowing the proposed rate reduction. But surely, under its power to fix minimum rates, 49 U.S.C. § 15(1), the Commission will have power to disapprove rates not compensatory. Nothing in this opinion disparages that power."

Conclusion

As the Court knows, the railroad industry is closely regulated under the Interstate Commerce Act and the acts related thereto. Accordingly, the Court's requirement that the Commission, in promulgating administrative orders, express with certitude in its report the principles and basis for its decision, is a substantive requirement essential to the operation of the regulated industry.

The rates in question were filed to become effective September 30, 1959. As the record shows, they were designed to recover traffic which the New York Central was losing rapidly. The thrust of this appeal is to require the Commission to define with reasonable precision the latitude open to management to publish contract rates to meet the prevailing market conditions. The delay which has been incident to the establishment of these rates would be intolerable except on the basis of obtaining administrative landmarks which can guide future management decisions. This is particularly important because the railroads had inaugurated the legislative process which was arrested by a representation by the Chairman of the Commission that

> "* * * there was nothing in the law to prevent it so long as the rate adjustment does not create undue discrimination or preference and prejudice, that the carriers were free to initiate those proposals, and our specific recommendation in this regard is that there is nothing for the Congress to do. It is entirely within the hands of the carriers."
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> (Hearings Before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, Second Session on Problems of the Railroads, Part 3, p. 1899)

In short, the Commission's representation to the Smathers Committee was that no additional legislation was

required to authorize the establishment of contract rates as long as such rates did not violate Sections 2 and 3 of the Interstate Commerce Act. The Commission's report here before the Court does not find it necessary to make any findings under Sections 2 and 3, because it condemns the contract rate as destructive competition under the National Transportation Policy and therefore violative of Section 1 of the Interstate Commerce Act.

It is suggested that the Court's rule requiring certitude in administrative decisions was designed to eliminate precisely the confusion which prevails in the instant report of the Commission, a certitude which is an absolute necessity not only for sound management decisions in the regulated industry but also a prerequisite to sound remedial legislation, if indeed legislation is required. Thus, the Court's requirement is not only justified as an integral part of procedural "due process," but in the instant case is vitally important to sound decisions, both by the regulated industry and the Congress.

The questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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Dated: December 19, 1961.

Proof of Service

I, Robert D. Brooks, one of the attorneys for The New York Central Railroad Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of December, 1961, I served copies of the foregoing Reply to Motions to Affirm on the several parties thereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C., and to Lee Loevinger, Esq., Department of Justice, Washington 25, D. C. and to Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York City.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On Waterways Freight Bureau, The National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., The American Waterway Operators, Inc., and the Great Lakes Ship Owners Association, intervening defendant, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record, as follows:

   To Harry C. Ames, Esq., Attorney for Waterways Frieght Bureau, Transportation Building, Washington 25, D. C.

Proof of Service.

To Frederick A. Babson, Jr., Esq., Attorney for National Motor Freight Traffic Association, Inc., The Eastern Central Motor Carriers Association, Inc., Boss-Linco Lines, Inc., Interstate Motor Freight System and Roadway Express, Inc., 2001 Massachusetts Avenue, N. W., Washington 25, D. C.

To John H. Eisenhart, Jr., Attorney for American Waterways Operators, Inc., and the Great Lakes Ship Owners Association, Inc., Suite 411, 1025 Connecticut Avenue, N. W., Washington 6, D. C.

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